No. 13946.

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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HARRY WYNN,

*Appellant,*

*vs.*

RECONSTRUCTION FINANCE CORPORATION, TREASURE COMPANY, SAMARKAND OIL CO., EMPIRE OIL COMPANY, TRUST OIL COMPANY, SOUTHERN CALIFORNIA GAS COMPANY and G. DE BRETTEVILLE,

*Appellees.*

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## BRIEF OF APPELLEES.

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### Jurisdiction.

Appellant, Harry Wynn, has filed this appeal from an order entered by the United States District Court for the Southern District of California (Central Division) (herein referred to as the "District Court") which was filed by the Honorable Peirson M. Hall, Judge, on June 8, 1953 [R.[1] pp. 119-120] and which granted a Motion for Partial Summary Judgment in favor of appellees in pursuance of Rule 56(d) of the Federal Rules of Civil Procedure. Appellant also appeals from an order of the District Court, filed by Judge Hall on June

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[1]The references preceded by "R." are to the typewritten record on appeal herein.

8, 1953 [R. p. 112] which denied appellant's motion to Remand the Cause to the Superior Court of the State of California in and for the County of Los Angeles (herein referred to as the "State Court") from which it had been removed by appellees.

The complaint was filed by appellant on September 16, 1952 [R. pp. 8-21], in the State Court and summons was issued by the State Court on September 16, 1952 [R. pp. 6-7].

A Petition for Removal from the State Court to the District Court was filed by all of appellees on October 6, 1952 [R. pp. 2-5] and the cause was thereupon removed to the District Court by operation of law.

The answer of the appellees, Treasure Company, Samarkand Oil Co., Empire Oil Company, Trust Oil Company and G. de Bretteville, was filed in the District Court on October 10, 1952 [R. pp. 22-26]; the answer of the appellee, Southern California Gas Company, was also filed in the District Court on October 10, 1952 [R. pp. 27-30]; and the answer of the appellee, Reconstruction Finance Corporation, was likewise filed in the District Court on October 10, 1952 [R. pp. 31-35].

All of appellees filed a Motion for Summary Judgment on December 4, 1952 [R. pp. 37-55] on the grounds that the pleadings together with certain affidavits [R. pp. 38-55] showed that appellees were entitled to judgment as a matter of law in pursuance of the provisions of Rule 56(b) and (c) of the Federal Rules of Civil Procedure.

Appellant filed a Motion to Remand the Cause to the State Court on December 24, 1952 [R. pp. 68-72].

Notice of Appeal from the aforesaid order of the District Court granting Partial Summary Judgment in favor

of the appellees and from the aforesaid order of the District Court denying appellant's Motion to Remand the Cause to the State Court was filed by appellant on July 6, 1953 [R. p. 121].

Appellant's complaint set forth three purported causes of action against appellees. Under the first cause of action, appellant asserted the right to moneys due to him from the appellees, Treasure Company and G. de Bretteville,[2] and further asserted that by reason of a certain contract entered into by all of the appellees, the property of his debtors was placed beyond his reach as a creditor, leaving him with no adequate and complete remedy at law for the collection of the indebtedness. Under the second cause of action, appellant sought to have the aforesaid contract adjudged fraudulent and void as against appellant on the grounds that it contains an assignment of all of the assets of the appellees, Treasure Company and G. de Bretteville, which assignment was intended to be and was for the purpose of delaying, hindering and defrauding appellant as a creditor. Under the third cause of action, appellant asserted title to certain participating royalty interests in oil, gas and other hydrocarbon substances produced from certain described property and sought to quiet title to the same as against all of the appellees.

The appellees contend that the District Court had original jurisdiction of the cause for the reason that a federal question exists (28 U. S. C., Sec. 1349) and that by reason of such original jurisdiction the cause was properly removed from the State Court to the District Court (28 U. S. C., Sec. 1441(b)).

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[2]The appellee, G. de Bretteville, was joined as a party defendant on the assumption of appellant that the appellee, Treasure Company, is his *alter ego*. (App. Op. Br. p. 9, lines 15 and 16.)

Appellees do not question the jurisdiction of this Court to review the Order of the District Court overruling appellant's Motion to Remand the Cause to the State Court. The power of this Court to review an appealable order of the District Court arises in pursuance of the provisions of 28 U. S. C., Sec. 1291.

However, it is the position of appellees that the order of the District Court granting a Partial Summary Judgment to appellees is not an appealable order for the reason that it is not a final disposition of the controversy and that, accordingly, an appeal from such Partial Summary Judgment does not presently lie.

## Statement of the Case.

On September 28, 1942, a federal condemnation proceeding designated 2454-B Civil was brought in the District Court and resulted in an evaluation trial before a jury which was presided over by the Honorable Campbell E. Beaumont, Judge. This action (hereinafter called the "Evaluation Proceeding") was brought by the United States of America for the use of Reconstruction Finance Corporation under the authority of an Act of Congress approved January 22, 1932 (15 U. S. C. 601-617) as amended, and Public Law 507, 77th Congress, approved March 27, 1942, and Executive Order 9217, issued by the President of the United States on August 7, 1942 (7 F. R. 6177) in pursuance of the so-called "Second War Powers Act" of 1942, approved March 27, 1942 (Public Law 507, 77th Congress) which Acts and Executive Order authorized the Reconstruction Finance Corporation to acquire

by condemnation private property deemed necessary for military, naval or other war purposes.

The Declaration of Taking filed in the Evaluation Proceeding vested a fee simple absolute title in the United States Government on October 26, 1942, in a certain tract of land situate in Los Angeles County, California, which was needed as an underground reservoir for the storage of natural gas in connection with the prosecution of the war effort.

The condemned property was leased by the appellee, Reconstruction Finance Corporation, for whose use and benefit the property was condemned, to the appellee, Southern California Gas Company, and the property has in fact been used for over ten years as a gas storage reservoir.

Prior to the filing of the complaint in the Evaluation Proceeding, appellant had asserted certain participating royalty interests in certain oil and gas leases on portions of the condemned property. Appellant was accordingly named as a defendant in the Evaluation Proceeding and appellant appeared in said proceeding by representation of counsel and filed an answer to the complaint alleging damages owed to him by reason of the government's seizure.

Contrary to the allegations set forth in paragraph II of the first cause of action in appellant's complaint in the action now before this Court [R. p. 9], appellant has not owned any interest whatsoever in those lots which are described in said paragraph of his complaint and which were the subject of the judgment entered in the Evaluat-

tion Proceeding by Judge Beaumont on July 13, 1949 [R. pp. 131-143].

The respective affidavits of the appellee, G. de Bretteville, and of Hector C. Haight, Manager of the Los Angeles Loan Agency of the appellee, Reconstruction Finance Corporation [R. pp. 38-50] designate the lots which were within the Declaration of Taking in the Evaluation Proceeding.

Other lots mentioned in said paragraph II of the first cause of action of appellant's complaint which were not within the perimeter of the area seized in the Evaluation Proceeding are not affected by the aforesaid judgment entered by Judge Beaumont. Appellant's allegation of ownership of participating royalty interests in certain leaseholds on lots *not seized by the government*, as set forth in appellant's complaint, and the denials set forth in each of the answers to the complaint [R. pp. 22, 27, 31] raise a material issue of fact with respect to such alleged ownership.

The District Court refused to grant a full summary judgment in favor of appellees because of the existence of the material issue of fact as to appellant's ownership of participating royalty interests in leaseholds on certain lots which were not within the government's seizure and the District Court therefore granted to appellees only a partial summary judgment.

The evaluation judgment entered by Judge Beaumont provided damages in the sum of $194,500.00 for the lessee's total working interest in a certain well known as

Treasure Well No. 8. This figure was based upon a verdict of the jury in the Evaluation Proceeding and inasmuch as various parties, including appellant, claimed participating royalty interests in the leasehold estate, distribution of the fund became the subject of a collateral proceeding in the District Court designated 2454-H. W. This proceeding was heard by the Honorable Harry C. Westover, Judge, without a jury, and resulted in a distribution judgment entered on October 30, 1950 [R. pp. 146-148]. The interest of the appellant in the condemnation award was therein held to be $11,502.00.

Prior to the distribution proceeding before Judge Westover, the appellee, Reconstruction Finance Corporation, entered into a certain agreement dated as of May 31, 1949 [R. pp. 149-182] to which agreement each of the other appellees, except G. de Bretteville, is a party. This agreement did not contain any assignment to the appellee, Reconstruction Finance Corporation, of any leasehold estates in the condemned property and no such assignment could have been contained in the agreement for the reason that the fee simple absolute title to all of the condemned property was then vested in the United States of America. The agreement did provide for an assignment to the appellee, Reconstruction Finance Corporation, for a valuable consideration, of all of the right, title and interest in the said condemnation award of $194,500.00 which was then being asserted by the appellee, Treasure Company. The appellee, Reconstruction Finance Corporation, as assignee of the appellee, Treasure Company,

became a claimant in the aforesaid distribution proceeding before Judge Westover.

Following the entry of the said distribution judgment by Judge Westover, appeals were brought by each of the claimants, including appellant, to this Court (Case No. 12,961) and an opinion was filed by this Court in said appeal on May 23, 1952.

The appeal now before this Court raises three basic questions:

(1) Was the District Court correct in ruling that it had jurisdiction to adjudicate the issues raised in appellant's complaint and in refusing to remand the cause to the State Court?

(2) Assuming that the District Court did have jurisdiction, is its Order for Partial Summary Judgment a final disposition of the controversy so that it is an appealable order which is properly before this Court at this time?

(3) Assuming that an appeal does presently lie from the District Court's Order for Partial Summary Judgment, was the District Court correct in ruling that the appellees were entitled to such partial summary judgment?

## ARGUMENT.

### I.

### This Action Was Properly Removed to the District Court From the State Court Because It Seeks to Declare as Fraudulent and Void a Certain Contract Entered Into by the Co-defendants, Including Reconstruction Finance Corporation, a Corporation Chartered Under an Act of Congress Whose Entire Capital Stock Is Owned by the United States of America.

The appellee, Reconstruction Finance Corporation, is identified in the complaint as "a federal corporation" [R. p. 8] and the District Court in its Memorandum and Order [R. pp. 108-111] took judicial notice of the fact that more than one-half (viz., all) of the stock of Reconstruction Finance Corporation is owned by the United States. (*Cf., In re Mary Dunn, et al.* (212 U. S. 374) (1909), where the Supreme Court held that on a motion to remand, the federal court could judicially note that a corporate defendant was incorporated by an Act of Congress even without an averment of the fact in the plaintiff's pleadings).

An exhaustive annotation entitled "What actions arise under the laws and treaties of the United States so as to vest jurisdiction in Federal Courts" (14 A. L. R. 2d 992) states at page 1020:

> "Of course, if a situation is presented—as still frequently happens—involving an action by or against a Federal corporation of which the United States owns more than one-half the capital stock, a Federal question exists and the Federal trial courts have orig-

inal and removal jurisdiction, by and from the very Federal nature of the corporate litigant, irrespective of the issues or any involvement of Federal laws therein."

This Court has held that the United States District Court in Portland, Oregon, had jurisdiction on removal of a cause from the Oregon State Court by reason of the fact that the defendant in said action, Reconstruction Finance Corporation, is a corporation created by an Act of Congress with all of its capital stock being owned and held by the United States of America (*Machine Tool and Equipment Corporation v. Reconstruction Finance Corporation* (1942 C. A. 9th), 131 F. 2d 547).

However, the precise jurisdictional question raised in this appeal is whether an action brought in a state court which involves several defendants is removable to a federal court upon the sole ground that one of the defendants is Reconstruction Finance Corporation, a wholly owned government corporation. It is submitted that this question is answered affirmatively by the case of *Sabin v. Home Owners' Loan Corporation* (1945, C. A. 10th Okla), 147 F. 2d 653, cert. den. 326 U. S. 759, rehs. den. 326 U. S. 812, 329 U. S. 823, 330 U. S. 855.

The *Sabin* case involved a corporation which, like Reconstruction Finance Corporation, was chartered under an Act of Congress with all of its capital stock owned by the United States of America. Furthermore, it involved a corporation which, like Reconstruction Finance Corporation, could sue and be sued in any court of competent jurisdiction, federal or state (12 U. S. C. A., Sec. 1463).

In the *Sabin* case the court upheld jurisdiction of the federal court on removal of an action brought by in-

dividuals against the Home Owners' Loan Corporation and others, including its attorneys and officers, the clerk of a state court, the sheriff and his deputies and various persons connected with storage and transfer companies. The complaint had been filed for damages for alleged wrongful conversion of plaintiff's personal property growing out of a foreclosure proceeding which Home Owners' Loan Corporation had brought in the state court.

The Court of Appeals stated in its opinion, in 147 F. 2d at page 655:

> "The first contention advanced is that the court erred in denying the motion to remand. All of the defendants joined in the petition for removal. The ground of removal was that the suit was one of a civil nature arising under the laws of the United States. Section 24(1) of the Judicial Court, 28 U. S. C. A., Sec. 41(1) vests in the district courts of the United States jurisdiction of all suits of a civil nature arising under the Constitution and laws of the United States, where the amount in controversy exceeds, exclusive of interest and costs, the sum of $3,000.00; and section 28, 28 U. S. C. A., Sec. 71, authorizes the removal of any case of which the United States Courts are given original jurisdiction. The test for determining the removability of an action is whether the United States Court might have exercised original jurisdiction." (Citing cases.)
>
> "The defendant, Home Owners' Loan Corporation, is a corporation created under the Act of June 13, 1933, 48 Stat. 128, 12 U. S. C. A., Sec. 1461 *et seq.* All of its capital stock is subscribed by the Secretary of the Treasury on behalf of the United States. It is the wholly owned instrumentality of the United States in whose behalf the power to obtain and expend money is exercised. It therefore is entitled to

invoke the jurisdiction of the United States Courts, originally or by removal, save as limited by statute. *Federal Intermediate Credit Bank v. Mitchell*, 277 U. S. 213; *Tennessee Valley Authority v. Tennessee Electric Power Co., supra.*

"It is provided by Sec. 12 of the Act of February 13, 1925, 43 Stat. 941, 28 U. S. C., Sec. 42, that no District Court shall have jurisdiction of any action by or against a corporation on the ground that it was incorporated by or under an Act of Congress, but the statute expressly excludes from its operation actions by or against a corporation chartered by an Act of Congress and in which the United States owns more than one-half of the capital stock. Since Home Owners' Loan Corporation was chartered by an Act of Congress and since all of its capital stock is owned by the United States this statute has no application here. *Federal Intermediate Credit Bank v. Mitchell, supra.* The action was removable and the court correctly denied the motion to remand. *Tennessee Valley Authority v. Tennessee Electric Power Co., supra.*"

The original assumption of jurisdiction by federal courts over actions involving corporations having federal charters was in pursuance of Mr. Chief Justice Marshall's holding in *Osborne v. Bank of United States*, 9 Wheat. 738 (U. S.) (1824). Prior to 1915 federal courts assumed jurisdiction over actions involving railroads which were incorporated under federal law but in 1915, by Act of Congress, this jurisdiction of the federal courts was removed. In 1925 Congress further limited the jurisdiction of federal courts over federal corporations so that no jurisdiction now vests in the federal courts on the sole ground of federal incorporation where less

than 50% of the capital stock is owned by the United States of America (28 U. S. C. A., Sec. 1349). However, the basic doctrine of *Osborne v. Bank of United States, supra,* except as limited by the aforesaid Acts of Congress, remains fully effective and as held in the *Sabin* case, the grounds for federal jurisdiction are still based upon the existence of a controversy arising under the laws of the United States where an action is brought against a defendant corporation which was chartered by and is wholly owned by the United States of America.

The case of *In re Mary Dunn, et al, supra,* involved a suit brought against a railroad corporation which had been created by an Act of Congress and the decision was rendered in 1909, prior to the above-mentioned congressional action which removed such suits from the jurisdiction of the federal courts. The reasoning of the Supreme Court of the United States in this case is nevertheless pertinent, and is fully applicable to any suit brought against a federal corporation where more than 50% of its stock is owned by the United States of America.

In the *Dunn* case the complaint sought to establish joint liability of the defendant railroad and two of its employees, for negligence. The action was originally brought in the state court in Texas and all of the defendants joined in a petition to the state court to remove the cause to the federal court for the Northern District of Texas.

The ground for the removal was alleged to be that the corporate defendant had been organized and was existing under the laws of the United States and that, accordingly, the suit arose under the laws of the United States and more particularly, under the law of the United States

constituting the charter of the corporate defendant. The removal was opposed by the plaintiffs, but the defendants nevertheless filed a copy of the record in the federal court and the plaintiffs then filed a motion in the federal court to remand the cause to the state court. The defendants answered the motion to remand and stated that while no claim of a separable controversy or of diversity of citizenship was made to support the federal court's jurisdiction, the application to remove was based upon the existence of a federal question as to all of the defendants.

The motion by the plaintiffs to remand was denied and the plaintiffs thereupon made an original application to the United States Supreme Court for a ruling directing the federal judge to show cause why the action should not be remanded to the state court.

The United States Supreme Court held that the Circuit Court of the United States for the Northern District of Texas had obtained jurisdiction by the proceedings for the removal and the rule to show cause was therefore discharged.

The opinion of the Supreme Court states:

> "If the question were as to the right to remove a case to the Federal court where the sole defendant was a corporation created by an act of Congress, there can be no dispute as to the right of such a defendant to claim the removal. As the corporation derives all its rights from a law of Congress, a suit brought against it on account of its action arises under the Constitution or laws of the United States. Osborn v. Bank of United States, 9 Wheat. 738, 817, 828, 6 L. ed. 204, 223, 225; *Pacific R. Removal* Cases, 115 U. S. 1, 29 L. ed. 319, 5 Sup. Ct. Rep. 1113. See also act of incorporation of the Texas & Pacific Railroad Company, 16 Stat. at L. 573, chap.

122, giving the right to the corporation (p. 574, §1) to sue and be sued in all the courts of law and equity within the United States.

"The question, then, is whether the United States circuit court for the proper district (northern district of Texas) would have had jurisdiction of a suit commenced in that district by the plaintiffs against the railway company and the two individual defendants. A suit against the company would, as we have seen, be one arising under the Constitution or laws of the United States, and as the individual defendants resided in the state of Texas (the same state as the plaintiffs) the ground of jurisdiction of the Federal court as to them must be that, by joining all as defendants in a joint action for the same wrong done by all of them, the plaintiffs thereby made the suit against the individual defendants also one which arises under the Constitution or laws of the United States.

"The plaintiffs themselves have made the act of which they complain a joint one, and, being one which arises under the Constitution and laws of the United States as to one of the defendants, it becomes so as to all, because it is joint. The Federal character permeates the whole case, including the individual defendants as well as the corporation. The case which plaintiffs make in their petition in the suit must determine the character of the cause of action. Alabama G. S. R. Co. v. Thompson, 200 U. S. 206, 216, 50 L. ed. 441, 446, 26 Sup. Ct. Rep. 161, 4 A. & E. Ann. Cas. 1147. The acts of the individual defendants were not necessarily, in and of themselves, inherently of a Federal nature."

See also a similar holding of the Supreme Court in *Texas etc. Ry. Co. v. Eastin*, 214 U. S. 153 (1909), and similar holdings collected in 14 A. L. R. 2d at page 1031.

On the basis of the foregoing authorities, it is submitted that this action was properly removed from the State Court to the District Court, on the sole ground that the appellee, Reconstruction Finance Corporation, was named as a party defendant. It is further submitted that it was proper for the District Court to assume jurisdiction over the entire dispute inasmuch as a suit to declare a contract void requires that all parties to the contract be made parties to the suit. *Shields v. Barrow* (17 How. 130, 15 L. Ed. 158); *United States v. Northern Pacific Railroad Co.* (134 Fed. 715).

**This Action Was Properly Removed to the District Court Because It Seeks to Quiet Title in Appellant to Certain Property Rights Which the Complaint Admits to Have Been the Subject of a Federal Condemnation Proceeding and Because the Relief Which Is Sought, as Disclosed on the Face of the Complaint, Would Obstruct and Defeat the Enforcement of a Judgment Duly Entered in Said Condemnation Proceeding, Thus Raising a Federal Question.**

Appellant's complaint admits in paragraph IX of the first cause of action [R. pp. 11-12] that the premises in which appellant seeks to quiet title to certain participating oil and gas royalties, were the subject of the Evaluation Proceeding.

Notwithstanding this admission, and notwithstanding the fact that Judge Beaumont's judgment holds that the property seized in the Evaluation Proceeding was vested in the United States of America in fee simple absolute on October 26, 1942 [R. p. 139], appellant's complaint alleges that the oil and gas leases in which participating royalty interests are claimed, were transferred to the appellee, Reconstruction Finance Corporation, by the appel-

lee, Treasure Company, in pursuance of a fraudulent contract entered into as late as 1949 [R. pp. 13-14].

As previously stated, all right, title and interest of the appellee, Treasure Company, in and to the leasehold estates on property which was the subject of the Evaluation Proceeding, had been divested as of October 26, 1942, and the appellee, Treasure Company, therefore had no right, title or interest in such leaseholds which it could have conveyed or transferred to the appellee, Reconstruction Finance Corporation. Inasmuch as appellant had been also divested of all of his right, title and interest in and to any participating royalty interests in said leasehold estates as of October 26, 1942,[3] it is not within the province of any state court in California to hold that appellant is and has been the owner of such participating royalty interests since the 5th day of April, 1938, as alleged in paragraph II of the first cause of action in appellant's complaint [R. p. 9].

The attempt, therefore, by appellant to have a state court determine that the appellee, Treasure Company, did own the leasehold estates in question at the time that it entered into the said contract with the appellee, Reconstruction Finance Corporation and others, that said contract was fraudulent and void, that appellant still owns his participating royalty interests in said leaseholds, and that a receiver should be appointed to account to appellant for the production from said leaseholds subsequent to the date of said contract, is an attempt on the part of appellant to impeach the validity of a judgment duly entered in the federal court which is final and binding.

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[3]As set forth in the Statement of the Case, *supra,* appellant claimed damages for this divestiture, obtained a judgment and had the judgment reviewed by this Court.

In *Beauville Associates, Inc. v. Lojoy Corporation, et al.* (C. A. Fla., 1950), 181 F. 2d 5, cert. den. 340 U. S. 905 (1950), the plaintiff sued the defendants in the State Court of Florida, attacking the defendants' title to property which the defendants had acquired under an order of the United States District Court in Miami. The defendants removed the cause to the federal court on the ground that the suit was one arising out of an attack upon the validity of the federal court's order and, therefore, was a civil action founded on a claim or right arising under the laws of the United States. A motion to remand was filed by the plaintiff, together with a motion to vacate the order dismissing the plaintiff's complaint. Both motions were denied and on appeal to the United States Court of Appeals for the Fifth Circuit, the trial court's judgment was affirmed.

The appellate court said:

> "Plaintiff, appealing from the orders of May 6th and May 13th, 1949, is here urging: (1) that its suit was not based upon a federal question, and, therefore, it should have been remanded; and (2) that, if the federal court had jurisdiction, it was error to dismiss the bill of complaint because it set forth facts which, if true, stated a cause of action.
>
> "We cannot agree with either of these contentions. It is quite clear, upon the authorities, that the suit was founded upon, and raised, a federal question authorizing its removal to the federal court. It is further clear, that the complaint and the amended complaint present nothing more than an effort, to do by indirection in the state court what it had been denied

the right to do by intervention in the federal court. This was to relitigate in the state court matters already determined in the federal court.

"It is quite plain that this is just another of the attempts of appellant, persisted in almost to the point of, if not beyond, contumacy, to continue to litigate matters already conclusively determined against its predecessor in title and itself. The judgment appealed from is Affirmed."

In *Torquay Corporation v. Radio Corporation of America, et al.* (D. C. N. Y., 1932), 2 Fed. Supp. 841, a suit in a state court, attacking the title to property acquired under a decree of a federal court, was held to involve a federal question and, therefore, to be removable. The federal court, in denying a motion to remand, held that from the allegations of the complaint it appeared that the relief sought, if granted, would constitute an interference with the operation of a decree of the federal court in an antitrust case and that the effect of the requested relief would be nothing less than modification of the terms of that decree in so far as it related to the disposition of certain stock in a corporation held by some of the defendants.

It is true that appellant's complaint does not expressly attack the validity of the condemnation judgment entered by Judge Beaumont on July 13, 1949 [R. pp. 131-143], but if the relief which the complaint seeks were granted the effect could be nothing less than the modification of the judgment inasmuch as it would destroy the fee simple absolute title to property which the condemnation

judgment vested in the United States of America. It follows that if the relief sought were in fact granted by the state court a federal question would be raised which could be reviewed by the Supreme Court of the United States which has held that the action of a state court in enjoining a defendant from doing acts pursuant to a valid decree of a federal court is error; *Central National Bank v. Stevens,* 169 U. S. 432 (1898).

**The Removal of This Action to the District Court Was Not Affected by the Failure of the Complaint to Contain an Express Allegation of the Jurisdictional Amount.**

Appellant's Opening Brief states at page 16:

> "The complaint contains no allegation of the jurisdictional amount required for an action in federal courts."

In answer to this particular argument, attention is directed to paragraph X of the first cause of action of the complaint [R. p. 13], in which appellant's monetary claim is stated to be $10,270.58. Further attention is called to paragraph XX of the first cause of action [R. p. 18], which suggests that appellant's "claim" must remain unpaid unless the relief requested is granted to appellant and to the prayer that a receiver be directed to sell property now in the custody of the appellee, Reconstruction Finance Corporation [R. pp. 20-21].

It is submitted that the above quoted references to the complaint clearly evidence that appellant is seeking in this action a monetary recovery in excess of $3,000.00.

In addition, it is well established that for purposes of determining the jurisdictional amount in the removal of a cause to the federal court where a property right is asserted, the value of the property is the amount in controversy. 76 Corpus Juris Secundum states at page 947:

> "When a property right is to be asserted by specific performance or protected by injunction, the value of that right is the amount in controversy within the meaning of the statutes relating to the removal of causes from a state court to a federal court. So in a suit in which plaintiff's title to real estate is in issue, or in which he seeks to quiet his title or remove a cloud therefrom, the value of such title, and not the value of the right or interest claimed by defendant, is the amount or value in controversy; * * * The whole value of the property, the enjoyment of which is in issue, is the measure of the value of the matter in controversy for the purpose of determining the jurisdictional amount."

In this connection it is to be noted that the complaint asserts a cause of action in which appellant seeks to quiet title to six 1% participating royalty interests in certain oil and gas leases, on lots which were the subject of the Evaluation Proceeding. The District Court could judicially notice that the value of said six 1% participating royalty interests of appellant in the leases described in Parcel 1, in paragraph II of the first cause of action of the complaint [R. p. 9], has been held to be $11,502.00 in the distribution judgment filed on October 30, 1950, by

Judge Westover [R. p. 147]. Therefore, the jurisdictional amount of $3,000.00 is satisfied on the basis of the quiet title cause of action alone. See also *Ayers v. Watson,* 113 U. S. 594, 28 L. Ed. 1093, 5 S. Ct. 641.

There is an additional answer to appellant's suggestion that the jurisdictional amount is not established in the case at bar. There is no necessity that the amount in controversy exceed $3,000.00 where the defendant is a wholly-owned corporation of the United States.

In *School District of Warminster Township v. Reconstruction Finance Corporation* (D. C. E. D. of Penn., 1947), 72 Fed. Supp. 149), a suit was brought by the plaintiff Township, seeking monetary damages in the amount of $582.20, as a penalty, representing 5% of the principal amount of certain real estate taxes which the plaintiff alleged that the defendant owed and had failed to pay when due. The plaintiff brought its suit in the Court of Common Pleas of Bucks County, Pennsylvania, and the defendant had the cause removed to the Federal District Court for the Eastern District of Pennsylvania. Plaintiff thereupon filed a motion to remand the cause to the state court, and one argument pressed by the plaintiff was that the amount in controversy did not exceed the jurisdictional requirement of $3,000.00. The question was argued and plaintiff's motion to remand was overruled.

II.

**Assuming That the District Court Did Have Jurisdiction of the Cause, Its Order for Partial Summary Judgment in Pursuance of Rule 56(d) of the Federal Rules of Civil Procedure Was Not a Final Disposition of the Controversy and Accordingly Is Not Appealable and Is Not Properly Before This Court at This Time.**

Judge Hall filed a Memorandum and Order in this action on May 4, 1953 [R. pp. 108-111].

The memorandum opinion stated that if all of the property described in appellant's complaint had been the subject of the Evaluation Proceeding, the appellees would have been entitled to a summary judgment. Because it appeared that a portion of the property, so described, had not been condemned by the government the opinion stated that it could not be said that there was no genuine issue of material fact for the reason that appellant has not yet had his day in court to attack the validity of the subject contract[4] with respect to the property not seized. Accordingly, the motion for summary judgment was denied in part and granted in part.

The partial summary judgment contemplated by Rule 56(d) of the Federal Rules of Civil Procedure is merely a pretrial adjudication that certain issues shall be deemed established for the trial of the case. It is not a final judgment and therefore is not appealable except in instances where an appeal is expressly permitted by statute.

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[4]The contract under attack makes no reference to any property which was not condemned in the Evaluation Proceeding.

In *Leonard v. Socony-Vacuum Oil Co.* (C. C. A. 7th, 1942), 130 F. 2d 535, it was held that a partial summary judgment was not final and not appealable. The Court said:

> "It seems quite apparent that the draftsmen were attempting, by providing for partial summary judgment, merely to speed up the trial by eliminating what were not deemed proper issues. The rule is very similar to Rule 16 concerning pretrial procedure for formulation of issues by the court in conference with the parties. In fact, the drafters expressly indicated that the same purpose lay behind both."

In *Audi Vision Inc. v. RCA Mfg. Co.* (C. C. A. 2d, 1943), 136 F. 2d 625, the trial court had granted the defendant's motion for summary judgment on one counterclaim but had left another counterclaim to be tried. On appeal it was held that the two counterclaims were so closely connected that the order was not final and was therefore not appealable. The Court said:

> "If the district court will take care in cases such as this to make it clear that its order is of the pretrial type as authorized under these rules, the parties will then more fully recognize their rights and the court will have retained full power, as it should, to make one complete adjudication on all aspects of the case when the proper time comes."

Holdings consonant with *Leonard v. Socony-Vacuum Oil Co., supra,* and *Audi Vision, Inc. v. RCA Mfg. Co., supra,* to the effect that an appeal does not lie from a partial summary judgment under said Rule 56(d), include:

*Russell v. Barnes Foundation* (C. C. A. 3d, 1943), 136 F. 2d 654; *Coffman v. Federal Laboratories* (C. C. A. 3d, 1948), 171 F. 2d 94, cert. den. 336 U. S. 913; *Biggens v. Oltmer Iron Works* (C. C. A. 7th, 1946), 154 F. 2d 214.

An authoritative article on summary judgment under federal practice by the Honorable Leon R. Yankwich, Chief Judge of the United States District Court for the Southern District of California, appears in 40 California Law Review 204. This article contains the following discussion of partial summary judgments at page 221:

> "Both before and after the 1947 amendments, it was contemplated that if judgment was not rendered upon the whole case, or for all of the relief asked, and trial became necessary, the court on hearing the motion should nevertheless ascertain the material facts which exist without controversy and make such an order stating such facts, which may include the extent to which the amount of damages or other relief is not in controversy, and directing further proceedings. The facts so specified in the order are deemed to be established for the purpose of the further proceedings. This is sometimes referred to as a 'partial summary judgment.' The phrase, however, involves a contradiction of terms. For a judgment is a final disposition of the controversy from which an appeal lies. And the courts have held definitely that an appeal from such partial summary judgment does not lie."

It is stated in Volume 3 of the treatise "Federal Practice and Procedure" by Barron and Holtzoff at page 117:

> "Thus it appears that an order entered under Rule 56(d) is not appealable merely because it is called a partial summary 'judgment.' The finality and appealability of a summary decision disposing of part of an action must be determined under Rule 54(b). That rule was recently amended to provide that when more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third party claim, the court may direct the entry of a final judgment upon one or more but less than all the claims only upon an express determination that there is no just reason for delay and upon an express direction for entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all of the claims."

It is submitted that the Order Granting Motion for Partial Summary Judgment under Rule 56(d) of the Federal Rules of Civil Procedure entered by Judge Hall on June 8, 1953 [R. pp. 119-120], from which appellant brings this appeal, is not a final disposition of the controversy and is not an appealable order under the authorities above cited.

## III.

## Assuming That an Appeal Does Presently Lie From the District Court's Order Granting Motion for Partial Summary Judgment in Favor of the Appellees, the Order Should Be Affirmed by This Court Because There Is No Genuine Issue of Material Fact Between the Parties With Respect to Property Rights Which Have Been Adjudicated by a Previous Judgment of the District Court Which Is Final.

The question presented by a motion for summary judgment is whether or not there is a genuine issue of material fact and not how that issue should be determined. *Gifford v. Travelers Protective Assn. of America* (C. C. A. 9th, 1946) (153 F. 2d 1209); and *Koepke v. Fontecchio* (C. C. A. 9th, 1949) (177 F. 2d 125).

Where there is no genuine issue of material fact but only a question of law, summary judgment is uniformly held to be proper. *New York State Guernsey Breeder's Co-Op v. Wickard* (C. C. A. 2d, 1944) (141 F. 2d 805) (cert. den. 323 U. S. 725).

In *Sabin v. Home Owners' Loan Corp., supra,* it was held that where matters urged by the plaintiff had been considered and passed upon by appropriate appellate courts and adjudicated against the plaintiffs, summary judgment against the plaintiffs was proper because the issues were *res judicata.*

The District Court was correct in concluding that there can be no genuine issue of material fact with respect to any property right asserted by appellant in those lots

described in his complaint which were seized by the government in lawful condemnation on October 26, 1942. The partial summary judgment granted to the appellees was strictly limited to the causes of action asserted by appellant with respect to these condemned lots, and appellees were entitled to such an order because appellant's claims had been previously determined in another action, thus raising the defense that the prior judgment is *res judicata.*

Appellees' motion for summary judgment was based in part upon the ground that the issues raised had been previously determined in another action and the District Court was therefore permitted to consider the record, briefs and admissions in the prior action. *Bonds v. Sherburne Mercantile Co.* (C. C. A. 9th, 1948) (169 F. 2d 433) (cert. den. 335 U. S. 899).

An examination of the judgment entered by Judge Beaumont in the Evaluation Proceeding [R. pp. 131-143] shows that title to the condemned lots vested in the United States of America as of October 26, 1942. The record shows that no appeal was taken from this judgment and that it is now final. The statute of limitation has run against any attempt to dispute the government's possession. *United States v. Adamant Co., et al.* (C. C. A. 9th, 1952) (197 F. 2d 1).

It follows, as a matter of law, that whatever interest appellant may have had in any of the property seized by the government in the Evaluation Proceeding was terminated on the effective date of the seizure and that ap-

pellant's rights were thereafter relegated to the fund which stood for the condemned property.

Appellant appeared, as above stated, in the Evaluation Proceeding as a defendant and the judgment by Judge Beaumont was submitted to his counsel for approval as to form [R. p. 142]. Thereafter appellant appeared as a claimant in the distribution proceeding before Judge Westover and subsequently appealed from Judge Westover's judgment [R. pp. 146-148] to this Court. *United States v. Adamant Co. et al., supra.* Although appellant contested the amount to be distributed to the appellee, Treasure Company, in these proceedings, he did not once contest the validity of the assignment by the appellee, Treasure Company, of its interest in the condemnation award to the appellee, Reconstruction Finance Corporation. This assignment was held valid by both the District Court and by this Court and the issue of its validity is also *res judicata.*

Appellant's Opening Brief is replete with allegations of fraud. These allegations for the most part are premised on the assumption that interests in real property were transferred from the appellee, Treasure Company, to the appellee, Reconstruction Finance Corporation, under the terms of the contract which is under attack. The assumption is not correct.

## Conclusion.

The subject suit was properly removed from the State Court to the District Court and the Motion of Appellant to Remand the Cause to the State Court was properly overruled.

The Order Granting Motion for Partial Summary Judgment in favor of appellees was properly entered by the District Court but such order is not a final disposition of the controversy, is not appealable, and is not properly before this Court at this time.

Respectfully submitted,

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